

**Certain-Teed Corporation and Glass Bottle Blowers  
Association of the United States and Canada,  
AFL-CIO. Case 10-CA-15796**

29 June 1984

**SUPPLEMENTAL DECISION AND  
ORDER**

BY MEMBERS ZIMMERMAN, HUNTER, AND  
DENNIS

On 19 March 1981 the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,<sup>1</sup> in which it found that by refusing to bargain with the Union, certified by the Board in Case 10-RC-11650 on 13 March 1980,<sup>2</sup> the Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act. The Board ordered the Respondent to cease and desist from its unlawful conduct, and to recognize and bargain with the Union. Subsequently, the Respondent filed with the United States Court of Appeals for the Eleventh Circuit a petition for review of the Board's Order, and the General Counsel filed a cross-petition for enforcement.

In an opinion dated 24 August 1983<sup>3</sup> the court denied enforcement of the Board's Order and remanded the case to the Board with the instruction that the Board decide whether the standard governing alleged campaign misrepresentations enunciated in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), should be applied retroactively to this case. The Respondent and the Union filed statements of position with the Board.<sup>4</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have carefully reviewed the entire record in the underlying representation proceeding, as well as the statements of position, and for the reasons discussed below we have decided to apply *Midland National* to this case. Accordingly, we shall reaffirm our Certification of Representative issued in Case 10-RC-11650 and our previous Order in this proceeding.

The Respondent refuses to bargain with the Union on the ground that certification of the Union was improper because during the election campaign the Union interfered with the employees' free choice by misstating the amount of wage raises given by the Respondent in the year preceding the election. In the underlying representation proceed-

ing, the Regional Director assumed that a misrepresentation had occurred, but overruled the objection on the grounds that the Respondent had an adequate opportunity to respond to the misrepresentation and that the misrepresentation would not likely have misled employees because most of them knew the amount of raises they had received in the previous year. The Regional Director applied the then current standard for misrepresentations set forth in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), and revived in *General Knit of California*, 239 NLRB 619 (1978). On 13 March 1980 the Board adopted the Regional Director's findings and certified the Union. As mentioned above, the Board subsequently found unlawful the Respondent's refusal to bargain with the Union.

While the Respondent's petition for review of the Board's order was pending in the Eleventh Circuit, the Board in *Midland National* abandoned the *Hollywood Ceramics-General Knit* standard and held that it no longer would probe into the truth or falsity of parties' campaign statements and would not set aside elections on the basis of misleading campaign statements. The Board stated in *Midland National* that the new policy shall be applied "to all pending cases in whatever stage."

The Eleventh Circuit found that the Board acted within its discretion in overruling *Hollywood Ceramics* and *General Knit*, and that the Board properly could apply *Midland National* retroactively to the Respondent's misrepresentation objection. Nevertheless, despite the "seeming clarity" of the Board's statement that the new policy would apply to all pending cases in whatever stage, the court concluded that it could not discern what effect the Board wished *Midland National* to have on cases pending before the courts. The court decided that a remand was necessary because the Board in the first instance should determine the retroactivity question.

The Board held in *Midland National* that, on balance, the *Hollywood Ceramics* rule operated more to frustrate than to further the fundamental statutory purpose of assuring employee free choice. In addition, the Board decided that applying the *Midland National* standard retroactively would impose no substantial hardship on an objecting party, but that failure to do so would be contrary to the statutory design sought to be achieved.

Here, the Respondent seeks to nullify the employees' free choice of a collective-bargaining representative through reliance on a policy which the Board has rejected. In remanding this case to us, the Eleventh Circuit stated that if *Hollywood Ceramics* is the standard to be applied the Board erred in overruling the misrepresentation objection

<sup>1</sup> 255 NLRB 65 (1981).

<sup>2</sup> Not reported in Board volumes.

<sup>3</sup> 714 F.2d 1042 (1983).

<sup>4</sup> We hereby deny the Respondent's motion for oral argument.

without holding a hearing, but that if the *Midland National* standard can be applied the objection will be overruled and the need for a hearing obviated.

Failure to give *Midland National* retroactive effect here would further delay the effectuation of the employees' statutory right to collective representation by forcing a hearing and Board review under a legal standard—*Hollywood Ceramics*—which the Board has decided frustrates the Act's purposes. The Supreme Court has instructed that in determining whether to apply a change in law retroactively it is necessary to balance the adverse consequences of retroactivity, if any, against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). We find that in *Midland National* the Board engaged in the *Chenery* balancing process and concluded that the new policy is to be applied to all pending cases. We recognize that the Board has no jurisdiction over cases pending in the circuit courts, but the Board is not precluded from expressing its intention that the *Midland National* rule be given the broadest possible retroactive effect. In this case, the court has asked for our guidance in determining whether the new rule should be applied retroactively. Moreover, rather than waiting for remands from other circuit courts in similar cases, we believe that the interests of efficiency and certainty will be best served if we look beyond this particular case and declare our preference that *Midland National* be applied retroactively to all pending cases, including those in the judicial stage. Such an approach comports with the well-established legal principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974).<sup>5</sup>

<sup>5</sup> Member Hunter agrees with the majority's decision to apply *Midland National* retroactively in this case and to overrule the Respondent's Ob-

Our ruling here is consistent with the opinions of two other circuit courts which have addressed the issue presented here. Both the Fourth and the Eighth Circuits have concluded that the Board intended to apply *Midland National* retroactively to cases pending before appeals courts and that to do so would not result in any manifest injustice.<sup>6</sup>

The Board in *Midland National* determined that its new misrepresentation rule "best accommodates and serves the interests of all." In view of that determination and the declaration that the new policy shall be applied "to all pending cases in whatever stage," we give *Midland National* retroactive effect in this case and overrule the Respondent's Objection 1. As that is the only remaining objection to be considered pursuant to the court's remand, we reaffirm the Certification of Representative issued in Case 10-RC-11650 and our prior Order in Case 10-CA-15796.

### ORDER

The National Labor Relations Board affirms its Decision and Order issued in this proceeding 19 March 1981 (reported at 255 NLRB 65) and orders that the Respondent, Certain-Teed Corporation, Athens, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

jection 1 on the merits. In so doing, he notes that this case was remanded to the Board for the express purpose of having the Board determine whether to apply *Midland National* retroactively. He disassociates himself from the language of the decision that applies *Midland National* to cases "at the judicial stage" because the Board has no jurisdiction over cases actually pending before the courts.

<sup>6</sup> *National Posters v. NLRB*, 720 F.2d 1358 (4th Cir. 1983); *NLRB v. Monark Boat Co.*, 713 F.2d 355 (8th Cir. 1983). See also *NLRB v. New Columbus Nursing Home*, 720 F.2d 726 (1st Cir. 1983); *NLRB v. Semco Printing Center*, 721 F.2d 886 (2d Cir. 1983); *NLRB v. Rolligon Corp.*, 702 F.2d 589 (5th Cir. 1983). In the last three decisions, the circuit courts agreed with the Board's application of *Midland National* retroactively in cases which had begun as Board representation proceedings under *Hollywood Ceramics*.